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IN THE

Supreme Court of the United States

NO. ———

CARL EUGENE SADLER,
MICHAEL ALFRED BRANDES,
STEVEN PAUL NEWCOMB and
WAYNE EDWIN LUCAS, JR.,

Petitioners,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Carl Eugene Sadler, Michael Alfred Brandes, Steven Paul Newcomb and Wayne Edwin Lucas, Jr., Petitioners, pray that a Writ of Certiorari issue to review the judgment of the Fifth Circuit Court of Appeals, entered in this case on January 17, 1974.

OPINIONS BELOW

Petitioners Carl Eugene Sadler, Michael Alfred Brandes, Steven Paul Newcomb and Wayne Edwin Lucas,

Jr., were convicted in the United States District Court for the Southern District of Florida, of conspiracy to possess with intent to distribute some eighty (80) pounds of marijuana, in violation of 21 U. S. C., Section 846. Sadler and Brandes were tried together and convicted on October 27, 1972. Newcomb and Lucas were tried together and convicted on February 28, 1973. In two separate appeals, the four of them appealed to the Court of Appeals for the Fifth Circuit. The opinions of the Fifth Circuit are reported as *United States v. Sadler,* 488 F. 2d. 434 (1974) and *United States v. Newcomb,* 488 F. 2d. 190 (1974). Copies of these opinions are attached hereto, as Appendix "A" (Sadler and Brandes) and as Appendix "B" (Newcomb and Lucas).

JURISDICTION

The Opinions of the Court of Appeals for the Fifth Circuit affirming the Trial Courts' findings that Petitioners were guilty of the offense of conspiracy to possess with intent to distribute marijuana, in violation of 21 U. S. C. §846, was entered on January 17, 1974. This Petition for Certiorari is not filed within thirty days of said date for the reason explained in the letters to the Clerk of the Supreme Court and Fifth Circuit of Appeals and attached hereto as Appendix "C". The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. All Petitioners present the following question:

Whether Petitioners' Motion to Inspect the Grand Jury Minutes should have been granted to enable Petitioners to determine whether the indictment was founded

on hearsay or other incompetent evidence, or alternatively, whether the trial court must make an in camera inspection of the grand jury minutes to see if the grand jury was notified of the hearsay nature of the testimony received, where defendant has asserted that the grand jury heard only incompetent, hearsay evidence.

2. Petitioners Sadler and Brandes present the following questions:

(a) whether, in using the terms "unlawful" and "lawful" entrapment in his charge to the jury, the trial judge committed "plain error" pursuant to Rule 52 (b), Federal Rules of Criminal Procedure.

(b) whether the trial court erred in not allowing Petitioners Sadler and Brandes to present evidence in surrebuttal to new evidence introduced by the Government in rebuttal.

3. Petitioners Newcomb and Lucas present the following question:

Whether the trial judge erred when he refused to give a charge on entrapment, thus denying petitioners the right to present alternative, or inconsistent, defenses; that is Petitioners contend they should have been permitted to argue that, though they deny committing the acts they are charged with, if the jury should find that they did do these acts, then they were entrapped into committing them.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no statutory provisions involved other than 21 U.S.C. §846 for violation of which Petitioners were

convicted. This section is set forth in Appendix "D", attached hereto. For the sake of clarity, Count II, setting out a violation of 21 U.S.C. §841 (a)(1), for which Petitioners were found not guilty, is also included in Appendix "D".

The pertinent provisions of the *Fifth, Sixth,* and *Fourteenth Amendments* to the *Constitution of the United States* are set forth in Appendix "E", attached hereto.

REFERENCE

The following symbols will be referred to throughout this Petition:

"S & B, T" for the transcript of the trial proceedings in which Petitioners Sadler and Brandes were convicted.

"N & L, T" for the transcript of the trial proceedings in which Petitioners Newcomb and Lucas were convicted.

The parties will be referred to in this petition as they appeared before the trial court.

STATEMENT OF THE CASE

On September 14, 1972, Steven Paul Newcomb, Bruce Myers Seale, Carl Eugene Sadler, Michael Alfred Brandes, and Wayne Edwin Lucas, Jr. were indicted by a Federal Grand Jury, Miami, Florida, for violation of Title 21, United States Code, Sections 846 and 841 (a)(1), and Title 18, United States Code, Section 2.

Count I of the indictment charged the Petitioners and Defendant Seale with conspiring with each other to possess with intent to distribute eighty (80) pounds of marijuana. Count II charged Petitioners and Defendant

Seale with possessing with intent to distribute eighty pounds of marijuana. All were charged with aiding and abetting each other in Count II.

On October 24, 1972, Petitioner Lucas was severed from trial and trial by jury proceeded with the remaining three Petitioners and Bruce Myers Seale.

On October 27, 1972, the trial concluded. Petitioner Newcomb was found not guilty as to Count II and a mis-trial declared as to Count I. Seale was found not guilty as to both counts. Petitioner Sadler was found guilty as to Count I and not guilty as to Count II. Petitioner Brandes was found guilty as to Count I and not guilty as to Count II.

On February 26, 1973, Newcomb was re-tried on Count I of the indictment along with Lucas, who, having been previously severed from the first trial, was being tried on Counts I and II of the indictment. Lucas was subsequently granted a Motion For Acquittal as to Count II. On February 28, 1973, the trial concluded with Petitioners Newcomb and Lucas being found guilty of Count I of the indictment.

Petitioners Sadler and Brandes appealed. The opinion of the Fifth Circuit is reported at 488 F. 2d 434 (5th Cir. 1974), see Appendix "A", and affirms the Judgment and Commitment below. Petitioners Newcomb and Lucas also appealed. The opinion of the Fifth Circuit affirming their conviction is found at 488 F. 2d 190 (5th Cir. 1974) and is attached hereto as Appendix "B".

On or about September 1 or 3, 1972, in St. Augustine, Florida, his home, Petitioner Brandes met the confidential informer, who was using the alias, "Ronnie Dawsey", and

whose real name was Gregory Robinson. Mr. Robinson related that he first mentioned the subject of acquiring drugs from Petitioner Brandes, but Brandes would not give him any because Brandes said he was "paranoid" (S & B, T. 266). Brandes told him that he, Brandes, did not know where in St. Augustine to obtain a large quantity of marijuana nor did he know where to obtain heroin, but that he might be able to make a connection in Miami (S & B, T. 189-190). Petitioner Brandes and the informer then flew to Miami in their quest for drugs. Brandes testified that the informer paid for his ticket (S & B, T. 191), whereas the informer stated that Brandes paid for his own ticket (N & L, T. 43). Brandes testified that he was partly motivated in coming to Miami by the idea of a free trip to Miami, which he had never visited (S & B, T. 196). Once in Miami, Petitioner Brandes and the informer were met at the airport by Petitioner Sadler. Thence, all proceeded to the Dankers Inn in Miami. Petitioner Brandes testified that the informer registered in Room 303 for Petitioners Sadler and Brandes (S & B, T. 192). Petitioner Sadler testified that as soon as he met the informer that the latter began inducing him to procure marijuana for a wealthy organization that the informer represented. Petitioner Sadler said that upon learning from the informer the amount of money he was willing to pay for a large quantity of marijuana that he, Sadler, went out to look for some (S & B, T. 209). When Petitioner Sadler told Bureau of Narcotics and Dangerous Drugs' Agent, Jose Marin, who had now entered the negotiations stage on the side of the Government (S & B, T. 211), that he, Sadler, had not been able to obtain a large quantity of marijuana, Marin began putting a lot of pressure on Petitioner Sadler (S & B, T. 214). Later

that evening, the search of Petitioner Sadler, Marin, and the informer led them to 3081 Gifford Lane where Sadler knew of some people who might have marijuana. An occupant of that house had led Sadler to believe that a large quantity of marijuana would be available, but when Petitioner Sadler arrived there was no marijuana there. Sadler told agent Marin that Marin could not go inside the house because the people inside were "paranoid", meaning scared (S & B, T. 220). Agent Marin admitted that Petitioner Sadler was apprehensive about the deal (N & L, T. 138).

Agent Marin testified that Petitioner Newcomb and Defendant Seale were called into the affair by Petitioner Sadler and that Newcomb and Seale took over negotiations (S & B, T. 36). Petitioner Newcomb testified that he was in Miami on vacation and had gotten together with his friend, Defendant Seale, during his vacation, (N & L, T. 282-3). Further, Newcomb testified that Agent Sweat of BNDD discussed with him the purchase of marijuana, but Newcomb advised Sweat that he, Newcomb, was not interested in having anything at all to do with marijuana (N & L, T. 278). However, Petitioner Newcomb did admit that he accompanied Agents Marin and Sweat to the 3081 Gifford Lane address (N & L, T. 278) which was termed the "stash pad" by Agent Marin (S & B, T. 38), meaning a place where marijuana is stored. Shortly after arriving at the "stash pad", Petitioner Newcomb was arrested along with Defendant Seale. Approximately eighty (80) pounds of marijuana was seized (N & L, T. 108, 176-178).

Agent Marin's testimony shows Petitioner Newcomb to have been the owner of the marijuana and the one who

handled the negotiations in the final stages (S & B, T. 37; 40-42).

With respect to the Petitioner Lucas, the government proved that he rented a white Rambler in Orlando, Florida in September, 1972 (N & L, T. 25). The government could not prove that the trunk of the car was clean of contraband prior to it being turned over to Petitioner Lucas (N & L, T. 35). Specifically, the government's evidence showed that the car that Petitioner Lucas rented was seen leaving the Dankers Inn and was followed to 3081 Gifford Lane. Agent Milford saw, standing next to the white Rambler, a man wearing a green shirt with designs on it (N & L, T. 209). Later, Agents, Marin and Milford and the informer saw someone enter the Rambler and drive away (N & L, T. 57, 103, 210). Petitioner Sadler came out and told the agents that the person in the Rambler had gone to get more marijuana (N & L, T. 57, 104). Agent Milford later saw the Rambler return, and then shortly thereafter depart again (N & L, T. 211-212). Agent Warner later saw the Rambler enter the Dankers Inn parking lot, deposit Petitioner Sadler, and leave again. Warner followed the Rambler and subsequently arrested Petitioner Lucas who was wearing a dark green shirt with designs. A small amount of marijuana was found in the car's trunk (N & L, T. 219-222, 245).

Petitioners Sadler and Brandes were arrested at the motel (S & B, T. 109).

REASONS FOR GRANTING THE WRIT

1. Petitioners contend that disagreement in the Circuit Courts of Appeal over whether the trial court must inspect

grand jury minutes to determine whether the grand jury has heard only hearsay evidence, or having heard only hearsay, not been notified that they were receiving such shoddy merchandise, makes this a question ripe for Supreme Court guidance.

It is the position of the Fifth Circuit that:

> "While the presentation of hearsay testimony of an investigating officer in lieu of readily available testimony by direct witnesses is by no means a preferred procedure, it is neither unconstitutional nor inherently wrong. In the absence of some showing that the integrity of the grand jury proceedings has been impaired, an indictment even if based exclusively on such testimony will not be overturned on appeal."

United States v. Cruz, 478 F. 2d. 408, at 411 (5th Cir. 1973).

In many earlier Fifth Circuit cases, that court has held that a denial of a Motion to Inspect the Grand Jury Minutes is within the sound discretion of the trial court and is not subject to review in absence of an abuse of discretions *United States v. Gower*, 447 F. 2d. 187, 191 (5th Cir. 1971). Furthermore, even if it were conceded that the evidence presented to the Grand Jury were wholly hearsay, a defendant's argument that the indictment should have been dismissed will nevertheless fail. In *United States v. Klaes*, 453 F. 2d. 1375 (5th Cir. 1972), at 1375, the Fifth Circuit held:

> "Klaes' sole contention is that only hearsay evidence was presented to the grand jury, and therefore the indictment should have been dismissed. This con-

> tention is without merit. See Costello v. United States, 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397 (1956); United States v. Gower, 447 F. 2d 187 (5th Cir. 1971)."

Apparently the Fifth Circuit has not even gone so far as to question whether there is a duty to advise the grand jurors that they are hearing only hearsay evidence, though in the reported opinion of Petitioners' case, *United States v. Newcomb,* 488 F. 2d 190 (5th Cir. 1974), at 192 (See Appendix "B"), the Fifth Circuit, by way of contrast to its own position, calls to attention the fact that in the Second Circuit there are "supervisory guidelines" to be employed by courts in determining whether or not the independence and integrity of the grand jury have been impaired. In fact, the Second Circuit goes much further than this. In *United States v. Ramirez,* 482 F. 2d 807 (2d Cir. 1973), that Court says, at 811:

> In *Costello v. United States,* 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397 (1956), the Supreme Court held that an indictment may permissibly be based solely upon hearsay. *See also Lawn v.United States,* 355 U.S. 339, 78 S. Ct. 311, 2 L. Ed. 2d 321 (1958). That rule was qualified by this Court in *United States v. Estepa,* 471 F. 2d 1132, 1136 (2d Cir. 1972), holding that where the grand jury is " 'misled into thinking it is getting eye-witness testimony from the agent whereas it is actually being given an account whose hearsay nature is concealed . . .' *United States v. Leibowitz,* 420 F. 2d 39, 42 (2 Cir. 1969)," the convictions should be reversed and the indictment dismissed.

The Second Circuit, upon appeal of Ramirez, examined the grand jury minutes to determine whether or not the grand jury had been misled into believing it was getting an eye-witness account and found that the Government had very specifically established to the grand jurors that its witness was giving a hearsay account, *Ramirez, supra,* 482 F. 2d, at 812. Finally, the Second Circuit in *Ramirez,* at page 812, outlined the procedure that should be followed where defendant has made a Motion to Inspect the Grand Jury Minutes:

> In the light of *Estepa,* where it appears that the grand jury has heard only hearsay testimony, upon appropriate motion, the proper course for the trial judge to follow is to examine the grand jury minutes *in camera* to determine whether or not the grand jury was misled into believing it was given eye-witness testimony when in fact it was not.

An examination of *United States v. Estepa,* 471 F. 2d 1132 (2d Cir. 1972) reveals a concern for a defendant's Fifth Amendment rights that it not evidenced in the aforenamed decisions of the Fifth Circuit. In *Estepa, supra,* 471 F. 2d at 1136, Chief Judge Friendly said:

> When the framers of the Bill of Rights directed in the Fifth Amendment that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury," they were not engaging in a mere verbal exercise. The importance of avoiding undue reliance upon hearsay before a grand jury is heightened by this circuit's view that an indictment constitutes a finding of probable cause and avoids the need for a preliminary hearing under F.R.Cr.P. 5(c). *Sciortino*

v. Zampano, 385 F. 2d 132 (2 Cir. 1967), cert. denied, 390 U.S. 906, 88 S. Ct. 820, 19 L. Ed. 2d 872 (1968).

A further review of Second Circuit cases shows that as far back as *United States v. Umans,* 368 F. 2d 725, 730 (2 Cir. 1966), *cert. granted,* 386 U.S. 940, 87 S. Ct. 975, 17 L. Ed. 2d 872, *cert. dismissed as improvidently granted,* 389 U.S. 80, 88 S. Ct. 253, 19 L. Ed. 2d 255 (1967), that court had become concerned over the government's needless reliance on hearsay before the grand jury. For example, Judge Friendly, dissenting in *United States v. Payton,* 363 F. 2d 996, *cert. denied,* 385 U.S. 993, 87 S. Ct. 606, 17 L. Ed. 2d 453 (1966), at 1000, put these Petitioners' argument most forcefully:

> "The course followed by the government in this case makes a mockery of the Fifth Amendment's guarantee . . . what compromises this indictment is not that the grand jury heard only hearsay testimony as in *Costello* . . . but that, in sharp contrast to that case, it had no way of knowing that the testimony that was all it was hearing was hearsay.
>
> ---
>
> If, in these narcotics peddling cases, the government insists on pressing *Costello* to the point of offering a grand jury only hearsay testimony by a surveilling agent when there is no apparent reason save a transparently unworthy one for not producing the agent with first hand knowledge, it must make clear to the jurors the shoddy merchandise they are getting so that they can seek something better if they wish, . . ."

The Eighth Circuit has also considered the question presented here and has refused to adopt the approach of the Second Circuit, *United States v. Powers*, 482 F. 2d 941 (8th Cir. 1973), at 943.

In the case before this court, Petitioners contend that they should have been allowed to inspect the grand jury minutes or, alternatively, to have had the trial court inspect the minutes *in camera* to determine whether or not the grand jurors heard only hearsay evidence when first-hand knowledge was readily available and to find out whether, if hearsay was all that was presented, the grand jury was made aware that all it was hearing was hearsay.

It is a common practice in narcotics cases for the government to present only the testimony of a supervisory agent whose knowledge is gathered from the reports of field agents. This is the evil that petitioners herein maintain prevent the grand jury from fulfilling its traditional role as a screening agency, protecting innocent persons from whims of lazy, or worse, unscrupulous, prosecutors. Such a practice by the government of presenting only hearsay evidence, for whatever the reason, both threatens the integrity of the judicial system and deprives petitioners of their Fourth, Fifth, and Sixth Amendment rights.

Specifically, Petitioners argue that had the grand jury heard the first-hand testimony of the confidential informer in this case, Greg Robinson, the grand jurors might have found the testimony of that convicted narcotics user to be less than credible and, therefore, might have refused an indictment, particularly if the grand jurors had heard his account of how he first induced Petitioner Brandes

to procure marijuana for Robinson's "organization", which was none other than our Federal Government.

Petitioners concede that the testimony of the Government's Special Agent, Jose Marin, provided the grand jury with some first-hand testimony, but this does not detract from Petitioners' argument that had the grand jury heard the confidential informer testify, they might not have indicted Petitioners.

In the final analysis, if the trial court judge does not examine the grand jury minutes, as he may in the Second Circuit, how else will it ever be determined whether or not the grand jury was aware that all it was hearing was hearsay. In the reported opinion of this case below, *United States v. Newcomb,* 488 F. 2d at 192, the Fifth Circuit, after noting the "supervisory guidelines" of the Second Circuit, states, referring to Petitioners' case:

> "Here, there is no indication that the court below abused its discretion in not ordering the grand jury minutes produced for defendants. The trial judge, like this court, was given no reason to suspect that the indictment was ill-founded."

This statement is the crux of the problem. Petitioners contend that this court should resolve the conflict between the Circuits by declaring that upon proper motion by the defendant, he be allowed to inspect the grand jury minutes, or alternatively, the trial judge *in camera* inspect the grand jury minutes and make any other investigation necessary to determine (1) whether non-hearsay evidence is readily available; (2) whether the grand jury has been misled into believing it was hearing direct testimony rather than hearsay; and (3) whether there was a high probability that had the grand jury heard the eye-witnesses

it would not have indicted. See *United States v. Newcomb, supra,* 488 F. 2d at 192, fn. 1, and Second Circuit cases cited therein.

2. (a) Petitioners Sadler and Brandes assert that the trial court erred in charging the jury on the defense of entrapment by phrasing the definition of that defense in terms of "lawful" and "unlawful" entrapment when in fact entrapment is *per se* unlawful. Such a charge is inherently confusing. The jury in this case had an exceedingly difficult time understanding the judge's charge on entrapment to the considerable prejudice of Petitioners' constitutional rights.

There is conflict between the Circuits as to whether or not an entrapment couched in the terms "lawful-unlawful" is "plain error" under Rule 52 (b) of the Federal Rules of Criminal Procedure (F. R. Cr. P.), set out in Appendix "F".

In *United States v. Groessel,* 440 F. 2d 602 (5th Cir. 1971), *cert. denied* 403 U.S. 933 (1971), the Fifth Circuit recognized that:

> "... utilization of such terms as "lawful entrapment" and "unlawful entrapment" in a jury instruction is confusing and, perhaps erroneous." *Groessel* at 607.

But, the Fifth Circuit has refused to hold that such an instruction is, per se, plain error. See *United States v. Dukes,* 479 F. 2d 324 (5th Cir. 1973) at 326, where the Fifth Circuit reiterated its concern with a charge containing the phrase "unlawful entrapment" but held in that case that the charge considered as a whole was not so misleading or confusing as to prejudice the rights of the accused.

There is no doubt in Petitioners' case that the charge, which was filled with references to, and definitions of, lawful and unlawful entrapment, was confusing to the jury. Part of the charge in question is set forth in Appendix "G". First, the trial judge's charge defined two kinds of entrapment, one lawful and the other unlawful (S & B, T. 402). He went on to mention "unlawful entrapment" five times and "lawful entrapment" two times (S & B, T. 401-404). Secondly, some time after retiring to the jury room, the jury sent a message out to the judge requesting that he re-charge them on the definition of lawful and unlawful entrapment (S & B, T. 417). The court marked this request Court's Exhibit No. 3 calling the jury back in again and charged them on entrapment using the same charge as before (S & B, T. 419-421). The next morning the judge stated that the jury had asked him (Court's Exhibit No. 5) for a copy of the definition of lawful and unlawful entrapment for the jury room (S & B, T. 432). The court acknowledged that the jury was having problems with that aspect of the case (S & B, T. 433). Counsel objected to the jury having a written definition of entrapment so the judge charged the jury once again on entrapment using the same charge (S & B, T. 435-438). Throughout this lengthy procedure, counsel for petitioners maintained his objection to the trial court's entrapment charge (S & B, T. 334-335, 415-416, 422, 438). Finally, the jury requested that the testimony of Petitioner Brandes and that of the confidential informer be re-read to them. These two witnesses were the key witnesses surrounding the entrapment defense. The judge refused this request of the jury (S & B, T. 439).

Petitioners Sadler and Brandes wonder what clearer case could be presented to show that a charge couched

in terms of lawful and unlawful entrapment is inherently confusing and should be considered "plain error" under Rule 52(b), F. R. Cr. P.

Petitioners rely on a Tenth Circuit case, *United States v. Hayes*, 441 F. 2d 542 (10th Cir. 1971), which presents facts and issues much like the case *sub judice*. There, defendant posed an entrapment defense based on the activities of a confidential informer. The court there charged the jury on entrapment using a charge quite similar to the charge used in Petitioners' case, using the terms "lawful" and "unlawful" and defining each of those two types of "entrapment", *Hayes, supra*, at 543. The defendants did not object to the charge but raised the issue on appeal. The Tenth Circuit said, noting that the question on appeal was whether the instruction constituted plain error, at 543:

> In *Garcia v. United States*, 373 F. 2d 806, 809 (10th Cir. 1967), then Chief Judge Murrah stated as follows: "We must confess our inability to comprehend a "lawful" entrapment. In our view the accused is either entrapped or he is not entrapped. If he is entrapped, he cannot be punished.*** The words ['lawful' or 'unlawful'] add nothing to an understanding of the defense, and may indeed tend to confuse."

and further:

> In this case, we believe the defendants introduced sufficient evidence of entrapment to submit the issue to the jury. However, the trial court's charge was clearly erroneous when it instructed the jury regarding a concept of "lawful" versus "unlawful" entrapment.

> While counsel was at fault in not requesting an instruction in conformity with the earlier decision of this Court, we think that under the circumstances of this case, the trial judge committed plain error in his instructions. *Hayes* at 544.

By footnote to the last paragraph, the court quoted Rule 52 (b), F.R.Cr.P., which is set out here for convenience: "Plain errors or defects affecting substantial rights may be noticed although they are not brought to the attention of the court."

The *Hayes* opinion was followed shortly thereafter by *United States v. Hill,* 444 F. 2d 115 (10th Cir. 1971), which cited *Hayes* as controlling and stated that the district court's instruction on entrapment, which used the terms lawful and unlawful entrapment, though not objected to at the trial, was plain error under Rule 52 (b), F.R.Cr.P., and required reversal.

Petitioners contend that the charge given in their case was erroneous; there is no such thing as lawful entrapment. Entrapment is *ipso facto* and *ipso jure,* a defense to a criminal charge. Nowhere in the opinion of then Chief Justice Warren, writing for the majority in *Sherman v. United States,* 356 U.S. 369, 78 S. Ct. 819, 2L. Ed. 2d 848 (1958), is there found reference to two types of entrapment, one lawful and the other unlawful. Neither are these two concepts discussed in *Sorrells v. United States,* 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413 (1932), where this court first recognized and applied the entrapment defense. Again, the latest case considered by this court dealing with an entrapment defense, *United States v. Russell,* 411 U.S. 423, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973), nowhere mentions lawful or unlawful entrap-

ment. The majority opinions in each of these cases make clear that the focus of inquiry when an entrapment defense is presented is on the pre-disposition of the defendant, whereas the minority view is that the inquiry should focus on whether the government "instigated the crime," *Russell, supra,* 93 S. Ct. at 1641.

Chief Justice Warren may have been the "unwary innocent" and created the confusion over the lawful-unlawful entrapment charge when he wrote in *Sherman* that "[t]o determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." 356 U.S., at 372, 78 S. Ct., at 821.

In *United States v. Groessel, supra,* 440 F. 2d at 607, appellant argued that the "charge of the trial judge that 'the question is whether defendant is a strayed lamb or an ensnared wolf' was tantamount to an instruction that there are two types of entrapment—lawful and unlawful." *Groessel, supra,* at 607. The Fifth Circuit in *Groessel* felt that the "lamb-wolf" expression was no more than a metaphorized modification of Chief Justice Warren's "unwary innocent-unwary criminal" phraseology in *Sherman.*

Petitioners strongly contend that this conclusion by the Fifth Circuit is not supported by the decisions of this Court in *Sorrells, Sherman* and *Russell,* which all agree that the inquiry is between the predisposition of the defendant and the inducement of the government agents, not whether the entrapment was lawful or unlawful.

Most Circuits seem to agree with the Fifth Circuit that use of a lawful-unlawful entrapment charge is not plain

error. The Third Circuit in *Government of Virgin Islands v. Cruz*, 478 F. 2d 712 (3d Cir. 1973), at 719, states:

> ". . . although we believe that it would be preferable to avoid phrases like 'lawful entrapment' and 'unlawful entrapment' when charging a jury, we do not think that their use amounted to plain error so as to warrant consideration in the absence of a timely objection."

That court by footnote adds that the present Devitt and Blackmar instruction on entrapment makes no reference to "lawful entrapment". E. Devitt and C. Blackmar, *Federal Jury Practice & Instructions*, Section 13. 13 (2d ed. 1970). *Cruz, supra*, at 719.

A lawful-unlawful entrapment instruction is not improper in the Ninth Circuit, *United States v. Tatar*, 439 F. 2d 1300 (9th Cir.), *cert. denied* 404 U.S. 866, 92 S. Ct. 69, 30 L. Ed. 2d 109 (1971); *Robison v. United States*, 379 F. 2d 338 (9th Cir. 1967), vacated 390 U.S. 198, 88 S. Ct. 903, 19 L. Ed. 2d 1040, on remand 307 F. S. 403 (1968); nor in the Sixth Circuit, *United States v. Ambrose*, 483 F. 2d 753 (6th Cir. 1973); *United States v. Thompson*, 366 F. 2d 167 (6th Cir. 1966) (which held a lawful-unlawful instruction not improper citing *Sorrells* and *Sherman*); nor in the Eighth Circuit, *United States v. Cross*, 347 F. 2d 327 (8th Cir. 1965).

Petitioners Sadler and Brandes maintain that there is no legal authority for characterizing entrapment as lawful or unlawful. The issue is simply entrapment and that issue should go to the jury to determine whether the defendant was predisposed to commit a crime or whether his crime was the result of impermissible governmental

inducement rising to the level of creative activity. If he is found to be entrapped, he should be acquitted.

By using the terms "lawful" and "unlawful" the jury is forced into a boggy word game and must decide whether something that is unlawful per se, entrapment, might be lawful if the defendant were properly entrapped. On top of that shaky foundation, how can the court properly build in the jurors' mind a conception of where predisposition and inducement fit in the total framework.

The unlawful—lawful entrapment charge used in Petitioners' case denied them the full benefit of the defense of entrapment and hence denied them due process of law as guaranteed by the *Fifth Amendment* of the Constitution of the United States. Petitioners were also denied the right to a trial by an "impartial jury" as guaranteed by the *Sixth Amendment* because the jury was forced to decide whether the entrapment was "lawful" or "unlawful" and were therefore no longer "impartial" as to the defense of entrapment.

Therefore, for all of the foregoing reasons, Petitioners Sadler and Brandes believe that this Court should grant certiorari to resolve this important issue.

(b) Petitioners Sadler and Brandes assert that the trial judge erred in refusing them the right to present evidence in surrebuttal when the testimony of government's rebuttal witness, Greg Robinson, the confidential informer, went into new areas and injected fresh issues on which the petitioners were denied the right to present evidence in contradiction.

Petitioners admit that it is within the sound discretion of the trial judge to receive additional evidence after the

close of the case-in-chief, *Colsby v. United States,* 160 U.S. 70, 16 S. Ct. 216, 40 L. Ed. 343; *Turner v. United States,* 441 F. 2d 736 (5th Cir. 1971), but where the government's rebuttal injects new material or fresh issues, a defendant should be allowed surrebuttal, *Turner, supra,* 441 F. 2d at 739; *United States v. Doe,* 488 F. 2d 93 (5th Cir. 1973). This also seems to be a well settled point.

The Fifth Circuit in the opinion below, *United States v. Sadler,* 488 F. 2d at 436, points an accusing finger at defense counsel and states:

> "Defense counsel at no time during the informer's testimony objected on the basis of his going into new matter. When, after cross-examining the informer, defense counsel attempted to present more testimony, the court gave him the opportunity to demonstrate why additional evidence was necessary. This he was unable to do. He pointed to no new ground covered by the informer's testimony and gave no indication that his witnesses would do more than reiterate the evidence presented in the case-in-chief."

Petitioners contend that defense counsel did his best to show the court that he wished to introduce evidence contradicting the new issues opened up by the informer, but the court arbitrarily and prejudicially to Petitioners refused to allow defense counsel to explain what new evidence he would present (S & B, T. 296-298). As the court below noted, defense counsel's argued on appeal that he wished to show that informer was a narcotics addict with needle marks on his arm. The court says: "If this intention had been made known to the trial judge, he might have felt obliged to admit the impeaching evi-

dence." *Sadler, supra,* at 436. Petitioners assert that this defense counsel attempted to do, but was stiffled by the trial judge who said that never in ten years had he granted the right of surrebuttal. (S & B, T. 298).

Petitioners therefore submit that their right to due process of law under the *Fifth Amendment* has been abridged. Similarly, Petitioners have been denied their *Sixth Amendment* right to trial by an "impartial jury" because the jury in their case was not able to consider all the evidence that Petitioners could have presented on their behalf. Petitioners were greatly prejudiced by this abuse of discretion and argue that their Petition for Writ of Certiorari should be granted for this reason.

3. Petitioners Newcomb and Lucas argue that their petition for writ of certiorari should be granted so that this Court can examine and resolve the conflict in the Circuits over whether or not a defendant's denial of the acts constituting the crime charged is inconsistent with a defense of entrapment.

In most of the circuits ". . . the defendant may not absolutely deny every act necessary to constitute the offense and the claim entrapment on the part of Government agents," *United States v. Shameia,* 464 F. 2d 629, 631 (6th Cir. 1972). In *Shameia,* at 630 and 632, are cited cases from the First, Fifth, Seventh, Eighth and Ninth Circuits establishing the rule that defendant may not deny the act and nevertheless have benefit of an entrapment defense.

The Court of Appeals for the District of Columbia Circuit and the Fourth Circuit apparently allow the presentation of inconsistent defenses. In *Hansford v.*

United States, 303 F. 2d 219 (D. C. Cir. 1962), the court stated:

> "It was consistent with defendant's denial of the transaction to urge that if the jury believed it did occur the government's evidence as to how it occurred indicated entrapment.

Hansford, supra, 303 F. 2d, at 221. In *Crisp v. United States,* 262 F. 2d 68 (4th Cir. 1958), the Fourth Circuit held that where defendant claimed that the government agent had snatched a bottle of drugs from his hand, that is, there had never been any sale and at the same time presented an entrapment defense, there was ample evidence justifying submission of the issue to the jury and that it was perfectly proper to permit the alternative defenses.

Alternative defenses may be allowed in certain cases if substantial evidence of entrapment is injected into the case by the government and if the defendant offers no evidence of entrapment inconsistent with his denial of the crime. *See Sears v. United States,* 343 F. 2d 139, 143 (5th Cir. 1965); *Henderson v. United States,* 237 F. 2d 169, 172 (5th Cir. 1956); and *McCarty v. United States,* 379 F. 2d 285, 286-287 (5th Cir. 1967), explaining *Sears* and *Henderson.* The key in these three cases, the Fifth Circuit says, is the degree of inconsistency involved. Also in some Circuits if the defendant has produced uncontroverted evidence of entrapment he may be allowed alternative defenses. *See United States v. Alford,* 373 F. 2d 508, 509-10 (2d Cir.) (dictum), *cert. denied,* 387 U.S. 937, 87 S. Ct. 2062, 18 L. Ed. 2d 1003 (1967); *Redfield v. United States,* 328 F. 2d 532, 533 (D.C. Cir.) (dictum) *cert. denied,* 377 U.S. 972, 84 S. Ct. 1654, 12 L. Ed. 2d

741 (1964). Perhaps even more Circuits would agree that the defendant may plead alternative defenses and have an entrapment charge, even while he denies committing the requisite acts, where the government's proof establishes entrapment as a matter of law, *See United States v. Shameia,* 464 F. 2d 629 (6th Cir.) (dictum), *cert. denied* 409 U.S. 1076, 93 S. Ct. 684, 34L. Ed. 2d 664 (1972); *Sendejas v. United States,* 428 F. 2d 1040 (9th Cir.) (dictum), *cert. denied* 400 U.S. 879, 91 S. Ct. 122, 27 L. Ed. 2d 116 (1970).

Petitioners maintain that this Court should now examine the rule against pleading alternative defenses. There are three basic arguments for abolishing the rule. The first is that the rule forces a defendant to surrender fundamental constitutional rights in order to avail himself of his right to raise the defense of entrapment. The second argument is in requiring that defendant not be allowed to plead inconsistent defenses too great a burden is placed on his ability to defend himself. Third, even if defendants were allowed to plead alternative defenses, no additional burden would be placed on the government in proving their case.

Petitioners argue for a constitutional basis for the defense of entrapment. The constitutional limitations on entrapment as a device that promotes crime rather than preventing it could be based on Fourth Amendment, Fifth Amendment, or Fourteenth Amendment due process grounds.

As to the Fourth Amendment grounds, petitioners argue that an analogy between entrapment and illegal searches and seizures can be made. A confidential informer or under cover agent such as in petitioners' case, who

is employed by the government to ferret out crime indiscriminately is in reality "searching" for a crime, thus subjecting the individual to an unwarranted invasion of his right to privacy. This inducement of crime for the purpose of making an arrest may become as objectionable as the unlawful search. Therefore, any right which the government might have to induce people to commit a crime or to search for crime should be balanced by an individual's Fourth Amendment rights of privacy, dignity and personal integrity.

The Fifth Amendment provides that a person has a right to be free from coerced confessions. The analogy to entrapment is that in both cases the defendant is coerced into supplying evidence of his own guilt. The difference is that in entrapment the police, disguising their identity, solicit the defendant to commit acts which he does not realize will be used against him. With coerced confessions on the other hand, the police aggressively interrogate the defendant wringing from him a verbal statement. Therefore, if police may not elicit incriminating statements from a defendant by overcoming his will, then they should not be allowed to overcome his will by tempting him to commit an offense.

Possibly entrapment may also be based on the due process clause of the Fourteenth Amendment. There are two important due process requirements upon which this argument rests. First, before criminal liability can be established, the defendant must perform some culpable act. The police then should not have unlimited power to solicit criminal acts by the use of illegal entrapment methods, which eliminates the requirement of a culpable act, since the police could probably subvert anyone into committing a crime by using methods geared to that

person's particular weakness. (Note here that entrapment by police is most often used in the so-called victimless crime cases that appeal to a person's moral and/or physical weaknesses, such as prostitution, homosexuality, narcotics, illegal liquor, and gambling.) The second requirement is that the due process clause permits a deprivation of liberty only where a legitimate goal of society is achieved. There is no legitimate societal objective served by unlimited solicitation of criminal acts through the use of illegal entrapment because such methods promote crime rather than prevent it. So criminal acts are committed by those, who left alone, might have obeyed the law.

Petitioners contend that if the defense of entrapment is presumed to be based in the Constitution, then one who is prohibited from asserting alternative defenses is forced to choose between his constitutional rights. For example, if a defendant raises the defense of entrapment he is forced to forego his constitutional right against self-incrimination and his due process right to have the crime proven beyond a reasonable doubt. If he asserts his Fifth Amendment right to remain silent and his Fourteenth Amendment right to have the government prove him guilty beyond a reasonable doubt, then he is forced to forego his right to raise an entrapment defense. Petitioners argue that forcing them to make this critical decision at their trial violated the Supreme Court's own mandate in *Simmons v. United States,* 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968).

In *Simmons,* the defendant, in order to obtain standing to support a pre-trial motion to surpress evidence on Fourth Amendment grounds, was required to give certain incriminating testimony, which was later used at his trial

as evidence of his guilt. This Court said that it was "particularly sensitive" to rules that impose conditions deterring a defendant from asserting his Fourth Amendment objection. The rule from the court below required that a defendant who wished to establish standing had to do so at the risk that the words which he uttered would be later used to incriminate him. The court below had held that such testimony was voluntary and that there is no violation of the self-incrimination clause of the Fifth Amendment. This Court said, at 393, 394:

> A defendant is "compelled" to testify in support of a motion to suppress only in the sense that if he refrains from testifying he will have to forego a benefit, and testimony is not always involuntary as a matter of law simply because it is given to obtain a benefit. However, the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit. When this assumption is applied to a situation in which the "benefit" to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created. Thus, in this case Garrett was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against

him at trial on the issue of guilt unless he makes no objection.

Thus, if entrapment is presumed to be based in the Constitution, the mandates of *Simmons* should have precluded the trial court in petitioner's case from applying the rule that required them to admit the crime in order to raise the defense of entrapment. The application of the rule against inconsistent defenses forces defendants in general, and forced petitioners in particular, to surrender one constitutional right, the presumed right to be free from entrapment, in order to assert two other constitutional rights, the Fifth Amendment right against self-incrimination and the Fourteenth Amendment due process right to have the charges against them proven beyond a reasonable doubt.

Petitioners extend their argument by asserting that, even if this Court should find that the theoretical foundation of entrapment is not constitutionally based, it is still arguable under *Simmons* that the primary concern should be the importance of the right that the defendant has to give up in order to assert his Fifth Amendment right against self-incrimination. Although the Court in *Simmons* said that where the benefit is another constitutional right an intolerable situation is created, *Simmons*, supra, at 394, 88 S. Ct., at 976, 19 L. Ed. 2d, at 1259, the fact that the entrapment defense might lie only on the fringes of constitutionality or is one that is of vital importance to a defendant's ability to defend himself should not preclude the application of the *Simmons* rationale.

In *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), the prosecutor commented on the defendant's failure to testify, thereby prejudicing the

defendant before the jury for asserting his Fifth Amendment right to remain silent. The Court commented on the prejudicial effect on the jury that the prosecutor's remark might have:

> For comment on the refusal to testify is a remnant of the "inquisitorial system of criminal justice," *Murphy v. Waterfront Comm.*, 378 U.S. 52, 55, 84 S. Ct. 1594, 1596, 12 L. Ed. 678, which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. *People v. Modesto*, 62 Cal. 2d 436, 452-453, 42 Cal. Rptr. 417, 426-427, 398 P. 2d 753, 762-763. What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.

Griffin, at 614. The Court goes on to hold that the defendant may not be penalized for exercising his Fifth Amendment right against self-incrimination by having the assertion of that right cost him so dearly when the prosecution comments on his silence or the court gives an instruction that such silence is evidence of guilt. *Griffin*, at 615.

Similarly, the defendant in an entrapment case who exercise his Fifth Amendment privilege against self-in-

crimination is also penalized because he is forced to forego the benefit of the defense of entrapment, or if he asserts the entrapment defense, he is penalized because he is forced to forego his Fifth Amendment right against self-incrimination. Petitioners contend that *Griffin* supports the rationale that the burden placed on a defendant who exercises his Fifth Amendment right does not have to result from the deprivation of another constitutional right, as occurred in *Simmons*. Instead, forcing a choice that causes the defendant to surrender his Fifth Amendment right against self-incrimination in order to exercise another important right should be sufficient to invoke the *Griffin* rationale. Based on *Griffin*, it seems that the application of the rule barring inconsistent defenses of denial and entrapment unnecessarily penalizes the defendant for exercising his right against self-incrimination.

The second argument attacking the rule against inconsistent defenses is that such a rule places too great a burden on the defendant's ability to defend himself. When a defendant is forced to admit the crime in order to assert entrapment as a defense the government is automatically relieved of proving the commission of a crime beyond a reasonable doubt. The government need only negate the entrapment defense which it can do by proving the defendant's predisposition to commit the crime. This predisposition evidence can include prior convictions, prior criminal activity even though no convictions were involved, and general character evidence. This type of evidence has a very prejudicial effect on juries. The defendant entrapped by the government, may decide because of his poor background to forego the entrapment defense and hope the government cannot prove his guilt beyond a reasonable doubt.

On the other hand, if the defendant decides to use the entrapment defense he is also prejudiced because the prosecution does not have to prove their case. Defendant looses the opportunity to learn the weaknesses of the government's case and looses the right to object to the government's evidence. Thus, if the rule against alternative defenses is abolished, the defendant would be provided with a valuable opportunity to evaluate and object to the government's case.

The third argument attacking the rule against inconsistent defenses is that even if the defendant were allowed to deny commission of the crime and alternatively, to say, that if the jury should believe he committed the crime, that he was entrapped into doing it, is that permitting alternative defenses places no greater burden on the government beyond the requirements of an ordinary criminal prosecution. The government, when it prosecutes an inducement-type case, must be reasonably satisfied that it has sufficient evidence to prove the elements of the crime beyond a reasonable doubt. It is to be expected that in such inducement cases the defendant will not incriminate himself by admitting the commission of the criminal act charged unless he thinks he can succeed with the entrapment defense alone. Therefore, the two constitutional rights that the defendant must surrender in order to raise the entrapment defense—the Fifth Amendment right against self-incrimination and the due process right to have the crime proved beyond a reasonable doubt—are burdens which the government would have to overcome in any ordinary criminal case. Thus, abolishing the rule against inconsistent defenses would not affect the government's prosecution of criminal offenders.

In summary then, petitioners argue that for three reasons the rule against alternative defenses should be abolished as imposing unreasonable and penalizing burdens on defendants in general, and on petitioners in particular as they proceeded from inducement to arrest to conviction. First, they were penalized by the rule against alternative defenses because they had to choose whether to assert their Fifth Amendment right against self-incrimination, or foregoing that right assert the defense of entrapment. Petitioners chose to assert their Fifth Amendment privilege and were penalized because they had to forego their beneficial right to raise the issue of entrapment. If, on the other hand, petitioners had plead entrapment they would have been forced to forego their Fifth Amendment right against self-incrimination as well as their right to have every element of the crime proven beyond a reasonable doubt. In the usual entrapment case, a defendant is also prejudiced because of the predisposition evidence that the jury will hear and because he never gets the opportunity to evaluate or object to the government's case. These penalties and burdens defendants must suffer even though abolition of the general rule would place no greater burdens on the prosecution. Petitioners admit that because in their case entrapment became an issue only late in the trial, they were spared the prejudicial effects of the introduction of predisposition evidence such as prior criminal activities and general character evidence, assuming the government could have presented such evidence.

In conclusion, petitioners maintain that it is time for this Court to take a closer look at the rule against alternative, or inconsistent defenses. The rule has created an intolerable situation wherein these petitioners were forced to choose between their constitutional rights, as in *Simmons*,

or between a constitutional right and another right that, though perhaps not quite of constitutional proportions, is of vital importance to their ability to defend themselves, as in *Griffin*.

For these reasons, Petitioners Newcomb and Lucas believe that this Court should grant certiorari.

CONCLUSION

The trial court erred in denying petitioners' Motion to Inspect the Grand Jury Minutes, in charging the jury on entrapment using the terms "lawful" and "unlawful" entrapment (petitioners Sadler and Brandes), and in denying surrebuttal to petitioners Sadler and Brandes after the government had injected new issues on rebuttal. The trial court also erred, in the trial of petitioners Newcomb and Lucas, in not allowing them to plead inconsistent or alternative defenses, that is, in not allowing them to both deny committing the acts charged and in the alternative also to plead that if the jury believe that they committed the acts charged that they were entrapped and induced into doing the acts by government undercover agents.

There is conflict in the Circuits as to each of these issues except the surrebuttal question. All of these questions need to be resolved as they go to the very foundation of the constitutional rights of these petitioners and all other defendants similarly situated. Petitioners contend that they were denied a fair trial by an impartial jury and thus were denied due process of law.

For the foregoing reasons, it is respectfully urged that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES of America, Plaintiff-Appellee,

v.

Carl Eugene SADLER and Michael Alfred Brandes,

Defendants-Appellants.

No. 72-3797

United States Court of Appeals,

Fifth Circuit

Jan. 17, 1974

Appeal from the United States District Court for the Southern District of Florida.

Before GODBOLD, DYER and GEE, Circuit Judges.

PER CURIAM:

[1] Appellants Sadler and Brandes were tried before a jury in the United States District Court for the Southern District of Florida and found guilty of conspiracy to possess with intent to distribute some 80 pounds of marijuana, in violation of 21 U.S.C. §846. Upon considering their appeal to this court, we find only two contentions which merit comment: (1) that the jury charge on entrapment was improperly phrased in terms of "lawful" and "unlawful" entrapment, and (2) that the court erred in not allowing the defense to introduce evidence in surrebuttal. After deliberating these and other issues not herein

discussed,[1] however, we conclude that their convictions must be upheld.

[2] We recognize that the court below did not heed our warning in United States v. Groessel, 440 F. 2d 602, 607 (5th Cir. 1971), that utilization of such terms as "lawful entrapment" and "unlawful entrapment" may confuse the jury. But we also note that defense counsel failed to call this flaw to the court's attention. Instead he requested a lengthy and somewhat redundant series of instructions which placed undue emphasis on the entrapment defense and which themselves made reference to "unlawful entrapment." Under such circumstances we cannot say that the charge constituted plain error under Rule 52, Federal Rules of Criminal Procedure.

[3, 4] Appellants complain that the trial court erred in allowing the government to put its informer on the stand in "rebuttal" without permitting them to introduce evidence in "surrebuttal" to contradict and impeach his testimony. In order to evaluate this complaint, we begin with the general rule that whether material evidence which could have been received as part of the case in chief should be admitted in rebuttal lies solely within the discretion of the trial court. See *Rodella v. United States,* 286 F. 2d 306, 309 (9th Cir. 1960), and cases cited therein. The court may properly decide that the prosecution should be allowed to rebut testimony by defense witnesses but that it should not be allowed to go into new matter which would prompt a surrebuttal by the defense. Indeed, this

[1] For our response to the argument that the trial court erred in refusing to grant defendants' motion to inspect the grand jury minutes, see our opinion in *United States v. Newcomb,*—F. 2d— (1974), disposing of the appeal of co-conspirators from their separate trial.

seems the most efficient manner of conducting, and terminating, a trial.

[5] Prejudice occurs only if the prosecution witness goes beyond rebuttal and injects fresh issues on which the defendant is denied the right to present evidence. By objection, defense counsel should call to the court's attention that a prosecution witness is going into new material which, if admitted, raises questions of rebuttal by the defense. If prosecution witness steps from the stand, the court may properly require him to point out the new matter covered and show how he intends to refute it. The objective is efficiently to conclude a trial when each side has had the opportunity to present his view of all issues fairly raised.

[6] Here the government refrained from calling the informer who negotiated the deal until his testimony became necessary to rebut the picture painted by the appellants and their two co-defendants when they took the stand. His testimony covered the same course of negotiations as that of the defendants—differing only in his portrayal of their willingness to make the sale.

When defense counsel attempted to put on additional evidence, the trial judge faced a situation very similar to the one analyzed in *Turner v. United States,* 441 F. 2d 736 (Fifth Cir. 1971). There the defendant had presented a vigorous alibi defense maintaining that he was not in the area of the crime when it was committed. The government called two witnesses, the defendant's landlord and a police officer who had seen him, to testify in rebuttal of this contention. The Fifth Circuit upheld the trial court's refusal to allow the defendant back on the stand, stating:

> Appellant admits that it is within a proper exercise of the trial court's discretion to permit a reopening

> of either the government's case or that of the defendant after the other side has rested and relies mainly upon *Dixon v. United States* (5th Cir. 1964), 333 F. 2d 348, and upon 23 C.J.S. Criminal Law §1053, page 1229, to the effect that "where new matter has been introduced by the state in rebuttal of an alibi defense the defendant may rebut the same on surrebuttal". The testimony of the government's rebuttal testimony in this case does not appear to us to be "new". The government had maintained throughout that the Defendant Turner was in Miami during the commission of the offense and the testimony of the two rebuttal witnessses simply goes to corroboration of that fact. In the event defendant had been allowed to take the stand at the surrebuttal he would only have been able to reiterate what he and others had testified to previously and that was to the effect that he had not been in Miami since June 5, 1966.

441 F. 2d at 739. When essentially the same questions arose again recently in *United States v. Doe,* F. 2d (5th Cir. 1973), this court adhered to the reasoning of the *Turner* decision. We do so here as well.

Defense counsel at no time during the informer's testimony objected on the basis of his going into new matter. When, after cross-examining the informer, defense counsel attempted to present more testimony, the court gave him the opportunity to demonstrate why additional evidence was necessary. This he was unable to do. He pointed to no new ground covered by the informer's testimony and gave no indication that his witnesses would do more than reiterate the evidence presented in the case in chief. Now, on appeal, we are told that, given the chance, defendant

would have impeached the informer's testimony by showing that he was a user of narcotics with needle marks on his arm. If this intention had been made known to the trial judge, he might have felt obligated to admit the impeaching evidence. Unfortunately, it was not. In passing we are puzzled why, if the question of the informer's drug use occurred to defense counsel at trial, he did not explore this subject on cross-examination. The court below properly drew the line short of surrebuttal.

Affirmed.

APPENDIX B

UNITED STATES of America, Plaintiff-Appellee,

v.

Steven Paul NEWCOMB and Wayne E. Lucas, Jr.,

Defendants-Appellants

No. 73-1659

**United States Court of Appeals,
Fifth Circuit**

Jan. 17, 1974.

Appeal from the United States District Court of the Southern District of Florida.

Before GODBOLD, DYER and GEE, Circuit Judges.

PER CURIAM:

Appellants Newcomb and Lucas were tried before a jury in the United States District Court for the Southern District of Florida and found guilty of conspiracy to possess with intent to distribute some 80 pounds of marijuana, in violation of 21 U.S.C. §846. We have considered each of the seven points raised on appeal and conclude that, while two merit discussion herein, none requires reversal of their convictions.

[1] Although each appellant took the stand and vigorously denied his participation in the conspiracy charged, both complain that the trial judge erred in refusing to give an entrapment instruction to the jury. Undiscouraged by the general rule in this circuit as stated in Canal Zone v. Risbrook. 454 F. 2d 725 (5th Cir. 1972), and United

States v. Groessel, 440 F. 2d 602 (5th Cir. 1971), that the defense of entrapment is unavailable to one who denies commission of the acts constituting the offense charged, they argue that they fall within the qualification to it expressed in Henderson v. United States, 237 F. 2d 169 (5th Cir. 1956), and Sears v. United States, 343 F. 2d 139 (5th Cir. 1965). The rationale of these latter two cases was explained in McCarty v. United States, 379 F. 2d 285, 286-287 (5th Cir. 1967) as follows:

> In both Sears and Henderson the defendant was indicted for conspiracy and raised the issue of entrapment with regard to a particular overt act. The court held in both cases that the defendant could deny being a party to a conspiracy and yet raise the issue that any overt acts done by him were done because of entrapment. The rationale of these cases was that inconsistencies in defenses in criminal cases are allowable so long as the proof of one does not necessarily disprove the other. Henderson, supra, 237 F. 2d at 173, Sears, supra, 343 F. 2d at 143. In both cases proof that the defendant was not a member of a conspiracy would not have necessarily disproved that he was entrapped into committing a particular overt act. In the instant case, however, proof that McCarty did not commit the acts constituting the sole offense charged necessarily disproves that he was entrapped into doing the offense. We hold this to be too great a degree of inconsistency in defenses to be permitted.

To this construction of the Henderson doctrine we add that the court in Sears emphasized that there the government's own case in chief injected substantial evidence of

entrapment into the case and that, therefore, the defendant was entitled to have the charge adjusted to the evidence. See Sears, supra, 343 F. 2d, at 143.

Here the government's case gave little or no cause for inference that either of these two defendants had been entrapped. Neither defendant's testimony accused the government agents of successfully inducing him to do anything. To the contrary, Newcomb emphatically testified that he consistently refused to secure any marijuana for the undercover agents and was "busted" while totally ignorant that any marijuana transaction was being conducted. Lucas' characterization of his own actions was, if possible, even more exculpatory: he denied that he was even aware that anyone was trying to purchase drugs. His story was that, after renting one car for himself and another for Mr. Newcomb and a friend, he met a girl in whose apartment on the same street as the "stash pad" he stayed for several days, thereby explaining the presence of his car in the vicinity of the crime. He denied that he was the person seen by agents coming and going from the house to which the marijuana was being brought.

The rule expressed in Henderson and Sears requires at the least that a defendant admit to some culpable act which he claims he was entrapped into committing. Here the only acts admitted by appellants were the purely innocuous ones of renting cars, being innocent bystanders in the vicinity of the crime, and (in the case of Newcomb) associating with undercover agents who were interested in purchasing marijuana. A collision of vacuums was thus presented; there was, and could be, no rational claim the government induced, and thereby entrapped, Newcomb or Lucas into performing such unincriminating acts. Appellants' real problem was that the jury chose to believe

the government's evidence that they directly participated in the conspiracy.

[2-4] The only other point on appeal that merits any discussion is defense counsel's contention that his motion to inspect the grand jury minutes should have been granted to enable him to determine whether the indictment was founded upon hearsay or other "incompetent" evidence. In the first place, the Supreme Court has decided, in Costello v. United States, 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397 (1956), that an indictment based exclusively on hearsay evidence is not constitutionally invalid and that a defendant is not entitled to litigate the sufficiency of the evidence presented to the grand jury. See United States v. Klaes, 453 F. 2d 1375 (5th Cir. 1972); United States v. Gower, 447 F. 2d 187 (5th Cir. 1971). Secondly, as we stated in United States v. Cruz, 478 F. 2d 408 (5th Cir. 1973), the "best evidence" rule advanced by some Second Circuit judges[1] serves simply as a supervisory guideline to be employed by courts in determining whether or not the independence and integrity of the grand jury have been impaired. Here there is no indication that the court below abused its discretion in not ordering the grand jury minutes produced for defen-

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[1] This rule would discredit an indictment based on hearsay where (1) nonhearsay evidence is readily available; (2) the grand jury is misled into believing it was hearing direct testimony rather than hearsay; and (3) there is a high probability that had the grand jury heard the eyewitnesses it would not have indicted. See *United States v. Leibowitz*, 420 F.2d 39 (2d Cir. 1969); *United States v. Malofsky*, 388 F.2d 288 (2d Cir. 1968) (dicta); *United States v. Umans*, 368 F.2d 725 (2d Cir. 1966) (dicta). See also dissenting opinions in *United States v. Beltram*, 388 F.2d 449, 451 (2d. Cir. 1968); *United States v. Payton*, 363 F.2d 996, 999 (2d. Cir. 1966).

dants. The trial judge, like this court, was given no reason to suspect that the indictment was ill-founded. Quite to the contrary, it was not even necessary for the grand jurors to rely on hearsay. The government agent in charge of the case testified before the grand jury. There, as at trial, presumably he was able to testify from first-hand information.

Were we to hold that grand jury minutes must be turned over so that defense counsel could satisfy his mere suspicion that the indictment was based on insufficient evidence, grand jury proceedings would effectively be open at the whim of the defense. This we are not disposed to do.

Affirmed.

APPENDIX C

LETTERS TO CLERKS OF FIFTH CIRCUIT COURT OF APPEALS And SUPREME COURT OF THE UNITED STATES

(1) Fifth Circuit Court of Appeals . . .

February 21, 1974

Ms. Carol Lesage and
Mr. Richard Windhorst
United States Court of Appeals
600 Camp Street
New Orleans, Louisiana 70130

Re: No. 72-3797
USA vs. Sadler, et al

No. 73-1659
USA vs. Sadler, Newcomb

Dear Ms. Lesage and Mr. Windhorst:

Thank you for your kind notification that the period for filing a petition for a writ of certiorari had expired in the above-styled case. Everyone in this office, after carefully considering the *Federal Rules of Appellate Procedure, Rule 41 (b),* had concluded that we had 30 days after the Stay of Mandate was issued in which to file our petition for Writ of Certiorari. It is my opinion that such an interpretation of Rule 41 (b) can be reasonably made. Of course, now I am aware of Rule 22.2 of the *Rules of the Supreme Court of the United States.*

Nevertheless, it is this firm's intention to file immediately a petition for Writ of Certiorari with the Supreme Court of the United States. I have been told this day by

Mr. Clark of the Clerk's office that Justice Powell may, at his discretion, consider the petition for presentation to the full court.

Thank you very much for your help and with best wishes, I am,

Very truly yours,

/s/PAUL J. SEWELL

(2) Supreme Court of the United States . . .

February 21, 1974

Clerk, Supreme Court of the United States
United States Supreme Court Building
1 First Street, N.E.
Washington, D.C. 20543

Attn: Mr. Clark

Re: USA vs Sadler and Brandes, No. 72-3797
USA vs Newcomb and Lucas, No. 73-1650

Dear Mr. Clark:

I am writing to notify your office that this firm intends to file immediately a Petition for Writ of Certiorari in the above-styled case, even though I have been notified by the Clerk of the Fifth Circuit Court of Appeals and by you yesterday by telephone, that the time for filing said Petition expired 30 days after entry of judgment by the Fifth Circuit, or February 16, 1974. I shall, at your direction, address the Petition to Justice Powell, whom you said may consider the Petition at his discretion, even though it is not timely filed.

By way of explanation of our tardiness in filing the Petition for Writ of Certiorari, let me explain the following facts: As background, there were three lawyers handling these two appeals. Two from this office, including myself, and a third, an outside consultant, who actually wrote the briefs and assisted in the preparation of the Motion for Stay of the Issuance of the Mandate. This third lawyer has had much experience in appellate work, both in the State and Federal Courts.

This office received by letter on January 17, 1974, notification from the Clerk of the Fifth Circuit Court of Appeals that judgment, adverse to our clients, had that day been entered in the two cases which we had appealed. The letter from the Clerk, a copy of which is herein enclosed, with some notes of mine added, referred us only to Rules 39, 40 and 41 of the Federal Rules of Appellate Procedure and to Rules 15 and 7 of the Local Rules of the Fifth Circuit.

The three of us went to Rule 41 (b), F.R.A.P., which states:

> "A Stay of the Mandate pending application to the Supreme Court for a Writ of Certiorari may be granted upon Motion, reasonable notice of which shall be given to all parties. The Stay shall not exceed 30 days unless the period is extended for cause shown."

Thereupon, we all concluded that we had 30 days from the date the Stay of Mandate was granted in which to file a Petition for the Writ of Certiorari. The Motion for Stay was filed on February 6, 1974, within the 21-day period before Issuance of the Mandate, as directed in Rule 41

(a), F.R.A.P. In our Motion for Stay, a copy of which is included, in Paragraph 1, we stated that within 30 days we intended to file a Petition for a Writ of Certiorari, then presented the questions we thought required Supreme Court attention.

While we now know that Rule 22.2 of the *Rules of the Supreme Court* requires that the Petition for Writ be filed within 30 days after entry of judgment, we contend that upon reading Rule 41 (b), F.R.A.P., reasonable men can conclude that they have 30 days after a Stay of the Issuance of Mandate is granted within which to file the Petition for a Writ of Certiorari. Rule 41 (b), F.R.A.P., gives no guidance itself as to when the Writ must be filed and says only that a Stay may be granted pending application for a Writ, nor is there any reference to Rule 22.2 of the *Supreme Court Rules.*

I think the confusion is furthered by the third sentence in Rule 41 (b) which states: "If during the period of the Stay there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court that the party who has obtained the Stay has filed a Petition for the Writ in that Court, the Stay shall continue until final disposition by the Supreme Court". This sentence gives the impression that one must obtain the Stay first and then during the 30 day period of the Stay file a Petition for a Writ of Certiorari.

In conclusion, I hope that our clients, whom we have been appointed to represent, are not prejudiced because of our inexperience with the proper procedure to be followed in such a case as this. We believe that our error was based on a reasonable interpretation of Rule 41 (b) F.R.A.P., which interpretation turned out to be incorrect.

It is our further hope that some correction or addition can be made to Rule 41 (b) so that others in the future will not fail to be referred to Rule 22.2, *Supreme Court Rules*, or will not otherwise fail to file their Petition for Writ of Certiorari within 30 days of the date of the entry of judgment by the Court of Appeals, Rule 36 and 41 (a), F.R.A.P.

Very respectfully submitted,

SILVER, ZEVIN, SEWELL & NATIONS

/s/PAUL J. SEWELL
for Murray M. Silver
Counsel for Appellants
and Daniel S. Zevin
(on the Brief)

PJS/jrr

Enc.

cc: Ms. C. Lesage
Mr. R. Windhorst
United States Court of Appeals
New Orleans, La. 70130

APPENDIX D

TITLE 21, SECTION 846, UNITED STATES CODE

§ 846. Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy. (Oct. 27, 1970, P. L. 91-513, Title II, Part D, § 406, 84 Stat. 1265)

To insure continuity and clarity, Section 841 (a)(1), Title 21, United States Code, is also here included;

Section 841. Prohibited Acts A—Penalties

(a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

APPENDIX E

Fourth, Fifth, Sixth and Fourteenth Amendments, U.S.C.

FOURTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of

the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

RULE 52 (b) FEDERAL RULES OF CRIMINAL PROCEDURE

(b) Plain Error.—Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

APPENDIX G

. . . Under that plea of not guilty, each defendant claims, according to the position taken by the lawyer and the argument that was made to you in summation, that even if the defendant did the things that are charged under the indictment, he is nevertheless not guilty and should be acquitted because he claims that he was unlawfully entrapped.

I charge you that the law recognizes two kinds of entrapment. One kind is lawful entrapment and the other kind is unlawful entrapment.

When a person has no previous intent or purpose to violate the law, but is wrongfully induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law, as a matter of policy, forbids a conviction in a situation like that.

On the other hand, where a person already has the readiness and the willingness to break the law, the mere fact that Government agents provide what appears to be a favorable opportunity is no defense, but that is what we call legal or lawful entrapment; and when I use the words "Government agents" I include the Government informer within the purview of those words.

For instance, when the Government believes that a person wishes to engage in an illegal activity of some kind, it is not necessarily unlawful entrapment for the Government agent directly or through an informer to afford that person an opportunity to commit the illegal act or acts which he is predisposed to commit.

The fact that the Government agent approached the suspects and that the agent was the first to mention the

commission of the illegal act does not, in itself, necessarily make the activities of the agent or the informer an unlawful entrapment.

The decisive question for determination by the jury is whether the defendant in question, at the time he was approached was ready and willing to commit the unlawful act, or whether, on the contrary, the defendant in question, at the time in question, had the normal desire of an honest man to obey the law, and had this desire overcome only through wrongful inducement and persuasion of Government agents or by Government agents.

To state this differently, the conduct with which the defense of entrapment is concerned is the manufacturing of crime by law enforcement officers and their agents.

Of course, such conduct is reprehensible and is a defense for an accused in which any unlawful entrapment exists.

On the other hand, law enforcement officers are permitted to engage in conduct involving deception and pretense and other tactics necessary for the detection and the conviction of criminals, provided such tactics are not excessive and do not wrongfully induce an innocent person to commit a crime.

Now, in determining this issue of whether the Government agent in this case acted lawfully or unlawfully, you should consider all the evidence in the case which tends to prove or disprove the readiness of the defendant to commit the alleged act at the time the defendant was approached by the government agent; and this, of course, is another situation where the Government has the burden to prove that what was done was lawfully done rather than unlawfully done.